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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-640

DWIGHT GEDULDIG,

Appellant,

vs.

CAROLYN AIELLO, individually and on behalf of all others similarly situated,

Appellees.

DWIGHT GEDULDIG,

Appellant,

vs.

AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, individually and on behalf of all other women similarly situated,

Appellees.

Consolidated Cases on Appeal From the United States District Court for the Northern District of California.

Brief of Merchants and Manufacturers Association, et al., as Amici Curiae.

This Brief Amici Curiae in support of the position of the Appellant is filed with the consent of all parties,[1] as provided in Rule 42 of the Rules of this Court.

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[1]Letters consenting to the filing of this brief have been filed with the Clerk of the Court.

Interest of the Amici Curiae.

The Merchants and Manufacturers Association and the Federated Employers of the Bay Area (hereinafter the "Associations") are organizations representing the interests of employers and groups of employers in the State of California. The Associations each represent the interests of hundreds of employers of varying sizes and in diverse industries. Some member employers have as few as one employee; others employ many thousands.

Southern California Edison Company, Union Oil Company of California, and Pacific Mutual Life Insurance Company (hereinafter the "Employers") are employers within the State of California, and as such, are subject to the disability insurance provisions of the California Unemployment Insurance Code (hereinafter sometimes referred to as the "Code").

Section 3251 of the California Unemployment Insurance Code provides that where an employer or the majority of its employees desire to avail themselves of a disability insurance plan other than that mandated by law, they may apply to the Director of Human Resources Development for approval of such "voluntary plan". Section 3254[2] of the Code requires the Director

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[2] "*§ 3254. Approval of voluntary plan: Conditions prerequisite: Termination of plan*

"The director shall approve any voluntary plan, except one filed pursuant to Section 3255, as to which he finds that there is at least one employee in employment and all of the following exist:

"(a) The rights afforded to the covered employees are greater than those provided for in Chapters 2 and 3 of this part.

"(b) The plan has been made available to all of the employees of the employer employed in this State or to all employees at any one distinct, separate establishment maintained by the employer in this State. 'Employee'

to approve such a plan if he finds that certain conditions have been met. Among other things, the Director

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as used in this subdivision includes such individuals in partial or other forms of short-time employment and employees not in employment as the director shall prescribe by authorized regulations.

"(c) A majority of the employees of the employer employed in this State or a majority of the employees employed at any one distinct, separate establishment maintained by the employer in this State have consented to the plan.

"(d) If the plan provides for insurance the form of the insurance policies to be issued have been approved by the Insurance Commissioner and are to be issued by an admitted disability insurer.

"(e) The employer has consented to the plan and has agreed to make the payroll deductions required, if any, and transmit the proceeds to the plan insurer, if any.

"(f) The plan provides for the inclusion of future employees.

"(g) The plan will be in effect for a period of not less than one year and thereafter continuously unless the director finds that the employer or a majority of his employees employed in this State covered by the plan have given notice of the termination of the plan. The notice shall be filed in writing with the director and shall be effective only on the anniversary of the effective date of the plan next following the filing of the notice, but in any event not less than 30 days from the time of the filing of the notice; except that the plan may be terminated on the operative date of any law increasing the benefit amounts provided by Sections 2653, 2655, and 2801, if notice of the termination of the plan is transmitted to the director not less than 30 days prior to the operative date of such law. If the plan is not terminated on such 30 days notice because of the enactment of a law increasing benefits, the plan shall be amended to conform to such increase on the operative date of the increase.

"(h) The amount of deductions from the wages of an employee in effect for any plan shall not be increased on other than an anniversary of the effective date of the plan except to the extent that any increase in the deductions from the wages of an employee allowed by Section 3260 permits such amount to exceed the amount of deductions in effect.

"(i) The approval of the plan or plans will not result in a substantial selection of risks adverse to the Disability Fund."

California Unemp. Ins. Code § 3254 (West, 1972).

must find that the voluntary plan will provide greater benefits to covered employees than they would receive through the State Disability Fund and that a majority of the persons employed by the employer in California or a majority of the persons employed at one of the employer's business establishments in the State has consented to the plan. The Director must also find that the employer has agreed to make any payroll deductions required by the plan.

Section 3260 of the California Unemployment Insurance Code permits an employer to assume all or part of the expense of providing the disability insurance coverage afforded by the voluntary plan. While the employer is permitted to make deductions from employees' wages to finance the plan, the amount of such deductions may not be higher than the deductions the employees would pay if they were paying contributions to the Unemployment Compensation Disability Fund administered by the State.

Each of the Employers, and many of the companies represented by the Associations, maintains an approved voluntary plan of disability insurance. Many California employers pay all or most of the costs of such voluntary plans. Many voluntary plans are part of comprehensive health and welfare programs maintained for the benefit of the employees, and such health and welfare programs are often established by collective bargaining contracts between the employer and one or more labor unions. The employer's maintenance of benefits under such a voluntary plan may be compelled by the collective bargaining contract. Further, the collective bargaining contract may require the employer to pay all or part of the cost of disability insurance under the voluntary plan, or it may forbid

the employer from increasing its employees' contributions even where such contributions could otherwise be increased pursuant to the provisions of the California Unemployment Insurance Code. Therefore, the employer may be unable to discontinue its voluntary plan or to increase its employees' contributions to the plan even though the costs of maintaining benefits under the plan increase far beyond the levels foreseen at the time of negotiating the collective bargaining contract.

Since, pursuant to Section 3254 of the Code, the benefits provided by each voluntary plan must be greater than those provided by the State Disability Fund, voluntary plans of disability insurance will be required to provide maternity benefits if the state program is required to provide such benefits. The Employers and the Associations have a substantial interest in seeing that benefits under their disability insurance programs are held to a fiscally responsible level because, as benefits rise, the expenses of employers who pay all or part of the costs of their voluntary plans may also rise.

Southern California Edison Company (hereinafter "Edison") employs more than 13,000 persons in California, and it maintains a voluntary plan which is part of a comprehensive, integrated health and welfare program. The program includes retirement benefits, group insurance, medical insurance, medical insurance for dependents, and a stock purchase plan as well as the voluntary plan of disability insurance. Edison's disability insurance plan provides benefits far in excess of those mandated by the California Unemployment Insurance Code.[2] In 1972 the total cost of Edison's dis-

[2]Employees with less than 6 months of seniority with Edison receive a weekly benefit while disabled of 110 percent of the

(This footnote is continued on next page)

ability insurance plan was $5,431,653, and employee contributions to the plan amounted to $1,036,283 or about 19.07 percent of the total cost of the program. By 1973 the cost of Edison's voluntary plan had risen to approximately $6,150,000, and employee contributions to the plan amounted to approximately $1,150,000 or 18.7 percent of the total cost.

In 1972, 13 Edison employees terminated their employment due to pregnancy, and another 31 employees took leaves of absence due to pregnancy.[4] Of the 31 employees who took pregnancy leave, 22 terminated their employment at the conclusion of the leave of absence,[5] and only 9 returned to work. The average length of the leaves of absence was 4.8 months. If Edison's disability insurance program had afforded maternity benefits to the 44 pregnant employees, the cost

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amount payable from the State Disability Insurance Plan for a maximum period of 26 weeks after a one week waiting period. There is no waiting period if the employee is hospitalized. Employees with 6 months or more of service receive full pay for each day of accrued and unused sick leave. Sick leave accrues at the rate of 1¼ days per month of active and continuous service. After full paid benefits are exhausted, an additional weekly benefit of 110 percent of the maximum benefit provided by the State Plan is payable for up to 52 weeks. There is no waiting period for receipt of such benefits.

In addition, for each day a disabled employee is hospitalized, not to exceed 20 days in a disability period, the plan pays an additional $12. Supplementary benefits are payable if a disability requires an employee to return to work in a job with a lower pay rate than his regular and customary job. If a disability period continues after termination of employment, benefits are payable to the extent they would be payable under the State Plan.

[4]Figures are not available for the number of pregnancy leaves of absence or the number of Edison employees who terminated their employment due to pregnancy in 1973.

[5]It is reasonable to assume that if maternity benefits were paid under disability insurance programs, virtually all pregnant employees would exhaust their maternity benefits under the plan prior to terminating their employment.

of the program would have been increased by approximately $127,000. If the average length of leaves of absence due to pregnancy increased to 6 months,[6] the additional cost to the program for the 44 pregnancies would have been approximately $150,000.

Union Oil Company of California (hereinafter "Union") employs approximately 5,700 persons in the State. Union's voluntary plan of disability insurance is part of an integrated plan of health and welfare benefits which includes retirement benefits, company-paid life insurance, employee-paid life insurance, medical benefits, medical benefits for dependents, supplemental accident insurance, survivor income protection and profit sharing in addition to the disability insurance provided by the voluntary plan. Union's voluntary plan of disability insurance is entirely financed through employee contributions. However, such contributions would be inadequate to support the plan if maternity benefits were also provided. For the two-year period from 1972 through 1973, Union's disability program cost approximately $958,265. During the same two-year period, 133 employees took leaves of absence due to pregnancy, and the leaves averaged slightly more than four months in duration. Seventy-three of these employees returned to their jobs following their leaves of absence, while 60 terminated their employment at the end of their maternity leave.[7] If the 133 women who took pregnancy

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[6]If maternity benefits are provided under disability insurance programs, the average length of pregnancy leaves of absence will undoubtedly increase because, at least for some employees, the financial incentive to return to work will be lessened.

[7]Union does not know the number of employees who terminated their employment due to pregnancy without first taking maternity leave because it does not keep records reflecting the

(This footnote is continued on next page)

leave during 1972 and 1973 had been eligible for maternity benefits under Union's disability program, the cost of the program would have been increased by approximately $234,361 or about 24.5 percent.

Pacific Mutual Life Insurance Company (hereinafter "Pacific Mutual") employs approximately 1,500 persons in California. Pacific Mutual's voluntary plan of disability insurance is part of an integrated, comprehensive health and welfare program which includes retirement benefits, survivor income protection, short term disability benefits,[8] life insurance, medical benefits, and medical benefits for dependents. Pacific Mutual's voluntary plan of disability insurance cost $124,571 during the two-year period from 1972 through 1973; employee contributions to the plan accounted for $99,234 or about 79.7 percent of this cost. Pacific Mutual's employees contribute only one-half the maximum amount permitted by the California Unemployment Insurance Code.

During 1972 and 1973, Pacific Mutual's employees experienced approximately 13,400 days of disability which were covered by its voluntary plan. During the same period, 26 employees terminated their employment

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reasons for voluntary terminations. Further, employees do not always fully or accurately state their reasons for terminating employment. Many who terminated for "personal reasons" or to "stay at home" may have actually terminated due to pregnancy. If maternity benefits are provided under policies of disability insurance, these employees can be expected to exhaust such benefits prior to termination. Therefore, the Employers' estimates of the increased costs which would arise from providing maternity benefits under voluntary plans are the minimum amounts by which such costs would rise.

[8]Pacific Mutual's short term disability benefits plan provides benefits in addition to those of its voluntary plan. The short term disability plan pays two-thirds of the salary of a disabled employee up to $2,500 of such salary per month.

due to pregnancy and 16 other employees took leaves of absence due to pregnancy. The average pregnancy leave of absence was 3.2 months. If the 42 women who took leaves of absence or terminated their employment due to pregnancy during 1972 and 1973 had been entitled to maternity benefits under Pacific Mutual's voluntary plan of disability insurance, $42,806, or about 34.4 percent, would have been added to the cost of the program.[9]

The Employers and the Associations are interested in this case due to the substantial financial effect which a decision upholding the District Court's opinion would have upon many California employers who maintain voluntary plans of disability insurance. The Employers and the Associations wish to assure that their unique financial interest is adequately protected and that their voluntary plans of disability insurance are not judicially modified to provide maternity benefits. This brief is filed to present those considerations and to urge this Court to reverse the District Court and to hold that a disability insurance program designed to protect workers against sickness and injury may constitutionally exclude provision of maternity benefits for normal, uncomplicated pregnancies.

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[9]The Employers' estimates of the amount by which maternity benefits would increase the costs of their disability insurance plans do not take into consideration the increased cost which could result from abuse of the plans. Normal, uncomplicated pregnancy is, unlike illness and injury, almost entirely voluntary. Therefore, affording maternity benefits under disability insurance plans would allow women not interested in a career to abuse the program by working a short period, becoming pregnant, and collecting maternity benefits after contributing little, if any, funds to their employers' voluntary plans.

ARGUMENT.

I.

This Case Should Be Dismissed as Moot Insofar as It Concerns Appellees Aiello, Armendariz and Johnson.

Former Section 2626 of the California Unemployment Insurance Code provided that disability benefits were not available for injury or illness caused by or arising in connection with pregnancy prior to 28 days after the termination of such pregnancy.[10] The District Court held that the third sentence of this provision deprived appellees of the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States. *Aiello v. Hansen*, 359 F.Supp. 792 (N.D.Cal. 1973). Appellant was enjoined from refusing to grant disability insurance benefits on account of the third sentence of Section 2626 and instructed to reconsider the applications of each of the appellees and grant them such benefits as they would have been entitled to receive without regard for that sentence.

Appellees Aiello, Armendariz and Johnson suffered complications in their pregnancies; Appellees Aiello and Johnson had ectopic pregnancies and Appellee Armendariz suffered a miscarriage. While this case was

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[10] "*§ 2626. What 'disability' or 'disabled' includes*

" 'Disability' or 'disabled' includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work. In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter."

California Unemp. Ins. Code § 2626 (West, 1972).

pending before the District Court, the California Court of Appeal for the Second Appellate District had before it *Rentzer v. California Unemployment Insurance Appeals Board*, 32 Cal.App.3d 604, 108 Cal.Rptr. 336 (1973), an action involving former Section 2626 of the California Unemployment Insurance Code.

Petitioner Rentzer had suffered an ectopic pregnancy and, as a result, had been unable to work for six weeks. When, pursuant to the third sentence of former Section 2626, she was denied benefits for the first 28 days of her disability, she petitioned for a writ of mandate directing the California Unemployment Insurance Appeals Board to provide her with full disability benefits. Her petition was denied and she appealed. On May 24, 1973, seven days prior to the District Court's decision in the instant case, the Court of Appeal reversed and narrowly construed the third sentence of former Section 2626 as excluding only *maternity* benefits.[11] So construed, the statute denied only benefits for normal gestation and delivery and did not deny benefits for women such as Ms. Rentzer and Appellees Aiello, Armendariz and Johnson, who suffered involuntary, unforeseen complications in their pregnancies.

Following the *Rentzer* decision the Department of Human Resources Development administratively determined that the exclusion of benefits contained in former Section 2626 of the Code should apply only to maternity benefits, that is, benefits for normal, uncomplicated gestation, delivery and recuperation. The Department issued revised guidelines reflecting these changes. As a result, women otherwise eligible for dis-

[11]The Court relied heavily on *Clark v. California Emp. Stab. Com.*, 166 Cal.App.2d 326, 332 P.2d 716 (1958). See pages 26 and 44-45, *infra*.

ability benefits were paid such benefits for abnormal pregnancies involving involuntary complications. The guidelines specifically provided that such complications included miscarriage, such as that suffered by Appellee Armendariz, and ectopic pregnancies such as those of Appellees Aiello and Johnson. Jurisdictional Statement of Appellant, Appendix I at 49-50. Appellees Aiello, Armendariz and Johnson each received full disability benefits identical to those they would have received had their injuries resulted from a cause other than pregnancy.

On October 1, 1973, Assembly Bill 809 was signed into law; it became effective on January 1, 1974.[12] That bill amended former Section 2626 and added Section 2626.2 to the California Unemployment Insurance Code. Section 2626.2 specifically provides full disability benefits for claimants disabled due to abnormal and involuntary complications of pregnancy.

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[12] "§ 2626. (a) 'Disability' or 'disabled' includes both mental or physical illness, mental or physical injury, and, to the extent specified in Section 2626.2, pregnancy. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work.

* * * *

"§ 2626.2. Benefits relating to pregnancy shall be paid under this part only in accordance with the following:

"(a) Disability benefits shall be paid upon a doctor's certification that the claimant is disabled because of an abnormal and involuntary complication of pregnancy, including but not limited to: puerperal infection, eclampsia, caesarean section delivery, ectopic pregnancy, and toxemia.

"(b) Disability benefits shall be paid upon a doctor's certification that a condition possibly arising out of pregnancy would disable the claimant without regard to the pregnancy, including but not limited to: anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyelonephritis, thrombophlebitis, vaginitis, varicose veins, and venous thrombosis."

California Unemp. Ins. Code §§ 2626, 2626.2, ch. 1026, §§ 2-3 [1973], 6 Deering's Calif. Codes Annotated, Advance Legislative Service, pp. 1936-1937, 1973.

Appellees Aiello, Armendariz and Johnson and all others similarly situated were, due to the decision of the California Court of Appeal in *Rentzer*, made eligible for full disability benefits prior to the rendering of the District Court decision in the instant case. Subsequent to the *Rentzer* decision the Department of Human Resources Development provided administratively for the payment of such benefits to persons such as Appellees Aiello, Armendariz and Johnson, and each of said Appellees was fully compensated for her injury. Finally, such benefits are now expressly provided to such persons by statute. Therefore, Appellees Aiello, Armendariz and Johnson and other women similarly situated have no interest in the continuation of this case in this Court. Having obtained eligibility for full disability benefits and having received such benefits, their cases have become moot and should be remanded to the District Court for dismissal. *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972). If not dismissed, these cases should be vacated and remanded for consideration of the mootness issue. *Struck v. Secretary of Defense*, 409 U.S. 1071 (1973), *vacating and remanding*, 460 F.2d 1372 (9th Cir. 1971).[12]

The remaining Appellee, Ms. Jaramillo, had a normal pregnancy and delivery, and, therefore, her action is one to compel the payment of maternity benefits under the disability provisions of the California Un-

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[12]Following the decision in *Rentzer*, Appellant herein moved for reconsideration of the District Court's decision. The motion was based upon the significant change in Section 2626 of the Code which was brought about by the *Rentzer* decision and by the liberal interpretation given that decision by the Department of Human Resources Development. Appellant's motion was denied, apparently without consideration of the mootness issue. Jurisdictional Statement of Appellant, Appendices C, D and E, at 31-38.

employment Insurance Code, an insurance program designed only to assist ill and injured workers. The District Court failed to realize the crucial distinction between Appellee Jaramillo's claim for maternity benefits and the other Appellees' claims for disability arising from the abnormal and involuntary complications of their pregnancies. Since the claims of Appellees Aiello, Armendariz and Johnson have become moot, this case now involves only the constitutionality of California's decision not to pay maternity benefits under its disability insurance program. The remainder of this brief concerns the appropriateness and constitutionality of that decision of the California State Legislature.

II.

The Statute Challenged Here Is Valid if It Meets the Standards Enunciated in Reed v. Reed[14] and Cleveland Board of Education v. LaFleur.[15]

A. The Statute Challenged Here Does Not Deny the Equal Protection of the Laws if the Classification It Creates Is Reasonable, Not Arbitrary and Has a Fair and Substantial Relation to the Object of the Legislation.

Legislation based upon suspect classifications or concerning fundamental interests is subject to strict judicial scrutiny and will be found to deny the equal protection of the laws unless it can be shown that such legislation is necessitated by a compelling governmental interest. *Graham v. Richardson*, 403 U.S. 365, 371-372 (1971); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). Legislation involving neither suspect classifications nor

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[14]404 U.S. 71 (1971). See pages 16-18, *infra*.

[15]42 U.S.L.W. 4186 (U.S. Jan. 21, 1974). See pages 22-24, *infra*.

fundamental interests is presumed valid and will be upheld unless it is shown that the legislation bears no rational relationship to a legitimate governmental purpose. *Rodriguez v. San Antonio Independent School District*, 411 U.S. 1 (1973).

Recent decisions both of this Court and of the lower federal courts hold that classifications involving sex are valid if they are reasonable, nonarbitrary, and rest upon some ground of difference having a fair and substantial relation to the object of the legislation. See *Schattman v. Texas Employment Commission*, 459 F. 2d 32, 40-41 (5th Cir. 1972); *Green v. Waterford Board of Education*, 473 F.2d 629 (2d Cir. 1973); *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971), *vacated and remanded*, 409 U.S. 1071 (1973); *Bravo v. Board of Education of City of Chicago*, 345 F.Supp. 155 (N.D.Ill. 1972).

In *Gruenwald v. Gardner*, 390 F.2d 591 (2d Cir. 1968), *cert. den.* 393 U.S. 982 (1968), the plaintiff, a male, challenged as unconstitutional a portion of the Social Security Act, 42 U.S.C. § 415(b)(3). He complained that, due to the statutory scheme of computing benefits, he received only $80.50 per month while a woman with a history of equal earnings would receive $115.60 per month. The court upheld the challenged provision, stating:

> "It is only the 'invidious discrimination' or the classification which is 'patently arbitrary [and] utterly lacking in rational justification' which is barred by either the 'due process' or 'equal protection' clauses. * * *
>
> "There is here a reasonable relationship between the objective sought by the classification,

which is to reduce the disparity between the economic and physical capabilities of a man and a woman—and the means used to achieve that objective in affording to women more favorable benefit computations. There is, moreover, nothing arbitrary or unreasonable about the application of the principle underlying the statutory differences in the computations for men and women. Notwithstanding the favorable treatment granted to women in computing their benefits, the average monthly payments to men retiring at age 62 still exceeds those awarded women retiring at that age. * * * "[T]he trend of authority makes it clear that the variation in amounts of retirement benefits based upon differences in the attributes of men and women is constitutionally valid. * * *"

Gruenwald v. Gardner, 390 F.2d 591, 592-593.

This Court has recently held that legislation attacked as sexually discriminatory is violative of the Equal Protection Clause of the Fourteenth Amendment only if such legislation creates arbitrary, unreasonable classifications which do not have a fair and substantial relation to the object of the legislation. *Reed v. Reed,* 404 U.S. 71 (1971). In *Reed,* this Court invalidated an Idaho statute which gave mandatory preference for appointment as administrator of a decedent's estate to a male applicant over an equally qualified female applicant. Referring to the standard of review required by the Equal Protection Clause, the Court said:

"In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat differ-

ent classes of persons in different ways. Barbier v Connolly, 113 US 27, 28 L Ed 923, 5 S Ct 357 (1885); Lindsley v Natural Carbonic Gas Co., 220 US 61, 55 L. Ed. 369, 31 S Ct. 337 (1911); Railway Express Agency v New York, 336 US 106, 93 L Ed. 533, 69 S Ct 463 (1949); McDonald v Board of Election Commissioners, 394 US 802, 22 L Ed 2d 739, 89 S Ct 1404 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 US 412, 415, 64 L Ed 989, 990, 40 S Ct 560 (1920). The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of §§ 15-312 and 15-314.

* * * *

"The objective of § 15-312 clearly is to establish degrees of entitlement of various classes of persons in accordance with their varying degrees and kinds of relationship to the intestate. Regardless of their sex, persons within any one of the enumerated classes of that section are similarly situated with respect to that objective. By providing dissimilar

> treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause. [Citation omitted.]"
>
> *Reed v. Reed*, 404 U.S. 71, 75-77.

Thus, in *Reed*, a case involving a statute which provided dissimilar treatment for males and females who were similarly situated, this Court found it unnecessary to apply the strict scrutiny required where suspect classifications or fundamental interests are involved.[16]

In *Police Department v. Mosley*, 408 U.S. 92 (1972), this Court struck down as violative of the Equal Protection Clause a municipal ordinance which made an impermissible distinction between labor picketing and other peaceful picketing. In so doing, the Court indicated that the standard enunciated in *Reed* is of broad applicability:

> "As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment. See Reed v Reed, 404 US 71, 75-77, 30 L Ed 2d 225, 229, 230, 92 S Ct 251 (1971); Weber v Aetna Casualty Co., 406 US 164, 31 L Ed 2d 768, 92 S Ct 1400 (1972); Dunn v Blumstein, 405 US 330, 335, 31 L Ed 2d 274, 280, 92 S Ct 995 (1972)."
>
> *Police Department v. Mosley*, 408 U.S. 92, 95.

Even if sex is held to be a suspect classification when, as in *Reed* and *Frontiero*, the legislation under review

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[16]In *Frontiero v. Richardson*, 411 U.S. 677 (1973), this Court invalidated certain statutes insofar as they accorded different treatment to male and female members of the armed services for the sole purpose of achieving administrative convenience. Four members of this Court indicated that they consider sex to be a suspect classification; a majority, however, did not so hold.

discriminates between males and females similarly situated, the compelling state interest test is inappropriate in the instant case because Sections 2626 and 2626.2 of the California Unemployment Insurance Code do not create a classification based on sex. Those sections do not afford different treatment to women than they do to men. By treating maternity differently than illness or injury, they merely create rational, nonarbitrary classifications among the members of a single sex.[17]

This distinction was recognized in *Bravo v. Board of Education of City of Chicago*, 345 F.Supp. 155 (N.D. Ill. 1972), where the court granted a preliminary injunction enjoining enforcement of a maternity leave policy which established rigid periods of mandatory leave for pregnant school teachers. The court concluded that the plaintiff had shown a reasonable probability that the maternity leave policy denied pregnant teachers the equal protection of the laws. However, the court rejected plaintiff's contention that the policy constituted sex discrimination:

> "The Court disagrees with the plaintiff's assertion that § 4-37's classifications constitute sex discrimination and need not, therefore, pass on the difficult question of whether sex is an inherently suspect criterion. Plaintiff is actually criticizing two distinctions drawn by the Board's maternity leave policy. The first distinction challenged is that

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[17]The classification in *Gruenwald, supra*, at 15-16, afforded different treatment to men than to women similarly situated. Nevertheless, that classification was upheld because it was nonarbitrary and reasonably related to the objective of the legislation. *A fortiori*, the classification challenged here, which does not afford different treatment to women than it does to men, is valid so long as it is nonarbitrary and reasonably related to a legitimate governmental purpose.

made by the mandatory leave policy as between teachers who are required to stop working during their sixth and subsequent months of pregnancy and for two months thereafter, and all other teachers. The second distinction drawn into question is that made between teachers on maternity leave and those absent from duty on other types of leaves. These obviously do not involve criteria that can be characterized as suspect. * * * "

Bravo v. Board of Education of City of Chicago, 345 S.Supp. 155, 157.

Citing *Reed,* the court concluded that:

"[T]he traditional standard is applicable here, with the burden upon the plaintiff to show that the classifications in the Board's maternity leave policy are arbitrary and unreasonable and not based upon grounds of difference having a fair and substantial relation to a legitimate object of the Board."

Bravo v. Board of Education of City of Chicago, 345 F.Supp. 155, 157.

In *Rafford v. Randle Eastern Ambulance Service, Inc.,* 348 F.Supp. 316 (S.D.Fla. 1972), a case involving a charge of sex discrimination by male employees discharged due to their unkempt beards and mustaches, the court held:

"Virtually all Title VII violations fit an equal protection definition of sex discrimination—dissimilar treatment for similarly situated men and women, where the treatment is based on sex. Reed v. Reed, 404 U.S. 71, 77, ...

* * * *

"The discharge of pregnant women or bearded men does not violate the Civil Rights Act of 1964 simply because only women become pregnant and only men grow beards. In neither instance are similarly situated persons of the opposite sex favored. These cases are perhaps more properly considered under the rubric of Cooper v. Delta Air Lines, Inc., 274 F.Supp. 781 (E.D.La. 1967), that discrimination between different categories of the same sex is not unlawful discrimination by sex. This is a case of discrimination in favor of men who shave off their beards and moustaches. It does not involve proscribed sex discrimination."

Rafford v. Randle Eastern Ambulance Service, Inc., 348 F.Supp. 316, 320.

Accord, *Fagan v. National Cash Register Co.*, 481 F. 2d 1115 (D.C.Cir. 1973); *Boyce v. Safeway Stores, Inc.*, 351 F.Supp. 402 (D.D.C. 1972).

The portion of the California Unemployment Insurance Code here under consideration provides only that maternity benefits shall not be paid under California's disability insurance program. Therefore, it denies benefits only to certain members of the female sex. Sections 2626 and 2626.2 of the Code create two classifications of women: those who have normal pregnancies and those who do not have normal pregnancies. All women similarly situated receive identical treatment. Since pregnancy, normal or abnormal, is a condition unique to the female sex, Sections 2626 and 2626.2 do not treat differently men and women who are similarly situated. Therefore, those sections discriminate only between different classifications of the same sex and are not unlawful sex discrimination. Accordingly, they should

not be subjected to the compelling state interest test even if that test is adopted for cases involving legislation, such as that invalidated in *Reed* and *Frontiero*, which treats similarly situated members of the two sexes in a disparate manner.

B. The Statute Challenged Here Does Not Deny Due Process of Law if the Classification It Creates Does Not Needlessly, Arbitrarily or Capriciously Impinge Upon Constitutional Liberties.

The exclusion of maternity benefits from coverage under California's disability insurance program does not deny due process of law to pregnant workers. In *Gruenwald v. Gardner*, 390 F.2d 591 (2d Cir. 1968), *cert. den.* 393 U.S. 982 (1968), the court observed:

> "It is only the 'invidious discrimination' or the classification which is 'patently arbitrary [and] utterly lacking in rational justification' which is barred by either the 'due process' or 'equal protection' clauses. * * * A classification or regulation, on the other hand, 'which is reasonable in relation to its subject and is adopted in the interests of the community is due process.' * * *"
>
> *Gruenwald v. Gardner*, 390 F.2d 591, 592.

The principles of due process enunciated in *Gruenwald* have recently been reiterated by this Court. In *Cleveland Board of Education v. LaFleur*, 42 U.S.L.W. 4186 (U.S. Jan. 21, 1974), this Court held that school board regulations which required pregnant teachers to commence unpaid maternity leave several months before the expected birth of the child created an irrebuttable presumption that all pregnant teachers became physically unable to perform their duties at a prescribed time before delivery. These regulations penalized the preg-

nant teacher for her decision to bear a child and thereby directly affected constitutionally protected freedoms.

Referring to the standards required by the Due Process Clause, the Court noted that:

> "[S]uch rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty. The question before us in these cases is whether the interests advanced in support of the rules of the Cleveland and Chesterfield County School Boards can justify the particular procedures they have adopted."
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> *Cleveland Board of Education v. LaFleur*, 42 U.S.L.W. 4186, 4189.

Finding that the school boards' regulations denied pregnant teachers the due process of law, the Court held:

> "We thus conclude that the arbitrary cut-off dates embodied in the mandatory leave rules before us have no rational relationship to the valid state interest of preserving continuity of instruction. * * *
>
> * * * *
>
> "[N]either the necessity for continuity of instruction nor the state interest in keeping physically unfit teachers out of the classroom can justify the sweeping mandatory leave regulations that the Cleveland and Chesterfield County School Boards have adopted. While the regulations no doubt represent a good-faith attempt to achieve a laudable goal, they cannot pass muster under the Due Process Clause of the Fourteenth Amendment, because they employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child."[18]

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[18]In *Hanson v. Hutt*, No. 42826 (Wash., Dec. 20, 1973), the Washington Supreme Court held violative of the Equal

(This footnote is continued on next page)

Cleveland Board of Education v. LaFleur, 42 U.S.L.W. 4186, 4190, 4191.

Thus, the exclusion of maternity benefits from coverage under California's disability insurance program does not deny due process of law if it bears a rational relationship to a valid state interest and does not needlessly, arbitrarily or capriciously impinge upon a vital area of constitutional liberty.

The remainder of this brief demonstrates that the exclusion of maternity benefits contained in Sections 2626 and 2626.2 of the California Unemployment Insurance Code is a rational, nonarbitrary classification, which bears a substantial relationship to a valid state interest. Further, it demonstrates that Sections 2626 and 2626.2 do not needlessly, arbitrarily or capriciously impinge upon any area of constitutional liberty nor do they create any irrebuttable presumptions which penalize women for choosing to bear a child. Those sections merely create a classification of a type which this Court has consistently upheld as within the proper discretion of the state legislature.

Protection Clause a section of the Washington State unemployment compensation law which denied benefits to pregnant women from the seventeenth week preceding the expected birth through the sixth week following delivery. The court held that classifications based on sex are suspect and, therefore, subject to strict judicial scrutiny. The State attempted to justify the classification by asserting that pregnant women are not genuinely attached to the labor market. Rejecting this contention, the Court noted that most women are able, despite pregnancy, to continue working in their normal occupations, and the length of time during which a woman cannot work following delivery is dependent on the individual woman. Therefore, the court's rationale, like that of this Court in *LaFleur*, was that the exclusion of benefits to all pregnant women for specified periods before and after delivery was overly broad and constituted an irrebuttable presumption of physical incompetency.

III.

Denial of Maternity Benefits Under the California Unemployment Insurance Code Is a Reasonable, Nonarbitrary Classification Because Normal Gestation and Delivery Is Not a Sickness or Injury.

Section 2601 of the California Unemployment Insurance Code states that the purpose of the Code is to compensate "in part" for the wages lost by individuals unemployed by "sickness or injury." Similarly, Section 2626 defines "disability" to include "both mental or physical illness and mental or physical injury."[19]

Under California's disability insurance program, benefits are provided for legitimate sickness or injury, including those maladies which are suffered solely or mainly by women.[20] The exclusion of maternity benefits from the disability compensation provisions of the California Unemployment Insurance Code is reasonable, nonarbitrary and does not discriminate against women because a normal, uncomplicated pregnancy is not a sickness or injury, and, therefore, is not the type of disability which California's disability insurance program is designed to alleviate.

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[19]See page 12, note 12, *supra*.

[20]While certain cosmetic plastic surgery is covered by California's disability insurance program, coverage for such surgery is limited to cases involving disabling disfigurement. Section 2626 of the Code provides that an individual is deemed disabled when, due to his "mental or physical condition" he is unable to perform his regular or customary work. Section 2708 of the Code provides that claims for disability must be supported by the certificate of a physician; the physician must state the medical facts within his knowledge and his conclusions with respect to the claimant's disability. Cosmetic plastic surgery is covered by state disability insurance only when a physician concludes that, due to the emotional trauma arising from his disfigurement, the claimant is disabled from performing his regular or customary work. Such disabilities are deemed to arise from the claimant's "mental condition" within the meaning of Section 2626 of the Code.

The California courts have recognized the distinction between maternity benefits and disability benefits for the sick and injured. In *Clark v. California Employment Stabilization Commission,* 166 Cal.App.2d 326, 332 P.2d 716 (1958), plaintiff attacked former Section 2626 of the California Unemployment Insurance Code claiming that that provision subjected her to an arbitrary classification, deprived her of the equal protection of the laws, and denied her due process of law. The court upheld Section 2626 stating:

> "The purpose of the unemployment disability program is to afford relief to employees sustaining loss of wages on account of illness, and not to confer maternity benefits. * * *
>
> "Also, it should be noted that the statute confines relief to loss on account of illness or injury. * * *"
>
> *Clark v. California Employment Stabilization Commission,* 166 Cal.App.2d 326, 332 P.2d 716, 719.

In *Rentzer,*[21] the court again recognized the distinction between maternity benefits and benefits of the type which California's disability insurance program was designed to provide. The court based its holding that the petitioner was entitled to disability benefits on the fact that:

> ". . . Rentzer's disability was not an ordinary maternity disability involving preparation for and recuperation from normal gestation and delivery. * * *"
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> *Rentzer v. California Unemployment Insurance Appeals Board,* 32 Cal.App.2d 604, 607, 108 Cal.Rptr. 336.

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[21]See page 11, *supra.*

Judge Williams, in his dissent from the District Court's denial of Appellant's Motion to Reconsider and Set Aside Summary Judgment, noted that pregnancy cannot be considered a sickness or injury:

> "If the majority looks upon a normal, healthy pregnancy as a mental or physical illness or injury, then I believe it has gone a long way in establishing a more offensive stereotype than any previously feared by plaintiffs. If the majority has chosen instead to characterize pregnancy as a 'physical or mental *condition*' (§ 2626, second sentence, emphasis added) having nothing to do with injury or illness, it does so only by ignoring the obvious coloring of the definition of 'condition' lent by the 'injury' and 'illness' language of the first sentence. And if this is the court's holding, then it has bestowed upon women workers in California a *maternity* insurance program never contemplated by the California legislature or courts."
>
> Jurisdictional Statement of Appellant, Appendix D at 33.

The distinction between maternity and sickness or injury is consistent with medical opinion and with the way in which our society views the condition of pregnancy. In J. McKinlay, *The Sick Role—Illness and Pregnancy*, 6 Social Sci. & Medicine 561 (1972), the author concludes that normal pregnancy, consisting of "an uneventful gestation and parturition" without "resulting obstetric or delivery complications", is not an illness and is not considered as such in American so-

ciety. Mr. McKinlay first notes that pregnancy is, unlike illness, a normal condition because:

> "*Firstly*, pregnancy can be considered statistically normal in that most of the population of possible conceivers at some time (usually several times) are in this state. One cannot claim that illnesses, like cancer, coronary thrombosis or pneumonia, are 'normal' in this sense. Most of the population at risk do not develop heart and respiratory conditions or become afflicted with cancer. Indeed, if they did, these states would most likely be considered as 'facts of life' or 'natural vicissitudes' (as is pregnancy) rather than as illness conditions.
>
> "*Secondly*, pregnancy can quite reasonably be considered 'normal' in the sense that it is a necessary biological function for the survival of the species. Its importance is manifest in the fact that society mobilizes financial and manpower resources to ensure that those who are in this state do not develop complications and become sick. Illness can never be viewed in the same way as a necessary biological process for survival. Indeed, in some forms it can even jeopardize survival.
>
> "*Thirdly*, pregnancy can be considered 'normal' because it is often thought to be a desirable state of affairs. For instance, one often congratulates a women [sic] when one finds out that she is 'expecting'. On the other hand, women who do not conceive are often considered to be in some ways abnormal and sanctions, often in the form of stigma, are applied.

"*Fourthly*, . . .

"Illness is defined as having two related aspects. It is said to involve both a disturbance of a biological state and, at some point, a disruption of role obligations. Pregnancy, it is true, may involve both these aspects at some time. It differs from illness, however, to the extent that it calls forth in both the woman, and her significant others, a set of responses which are in many ways different from those elicited with the onset of an illness. * * *"

J. McKinlay, The Sick Role—Illness and Pregnancy, 6 Social Sci. & Medicine 561, 568.

Having concluded that pregnancy is a normal condition, Mr. McKinlay considers whether it can be considered an illness and concludes that it cannot:

"*Firstly*, can the pregnant women be said to be allowed exemption from the performance of normal social-role obligations? It seems that it is seldom the case that a woman, by becoming pregnant, is automatically relieved of her obligation to fulfill certain role requirements. Indeed, it is not uncommon for women, during gestation, to experience what is termed 'role overload'—when too many expectations, all with pressures for performance, converge on one individual at the same time. By developing or 'manufacturing' a symptom or set of symptoms (e.g. high blood pressure, oedema or nausea) and thus making herself a candidate for the sick role, a pregnant woman in our society may attempt to negotiate herself into a sick role in order to relieve this social pressure. * * *

"*Secondly*, is the pregnant woman allowed exemption from responsibility for her 'condition'? It is often the case that a couple actually want a child and do everything in their power to encourage conception. Indeed, unless conception is actively discouraged, it is difficult for the woman to claim that she is not responsible for her condition. Yet, this exemption from responsibility, according to Parsons, is a prerequisite for eligibility for the sick role. It is precisely because one does not deliberately and continuously expose oneself to tuberculosis or typhoid, with the intention of contracting the disease, that one is not considered culpable for one's state.

"*Thirdly*, can we claim that the pregnant woman must be motivated to get well? It is usually assumed that illness is an undesirable state or an incapacity which, as quickly as possible, must be reversed by some kind of therapeutic action. Implicit in the concept of illness then, is the notion of cure. It has already been suggested that pregnancy is often intended and thought to be a desirable condition. Seldom do we talk of 'curing' pregnancy, nor do we act so as to help a pregnant woman 'get well'. The obligation to 'get well as soon as possible' while applicable to undesirable illness states, cannot be considered relevant to a normal state, such as pregnancy.

"*Fourthly*, can we claim that the pregnant woman is obliged to seek 'technically competent help'? There are sometimes severe sanctions applied to individuals who have an illness condition but who do not seek advice from, or cooperate with medical experts. In these cases one is usually already

ill and decides (or is advised) to see a professional. These cases are, in other words, curative. The maternity services, being largely preventive, are of an entirely different category and reflecting a somewhat different orientation. There is no real obligation to seek professional help. * * *

* * * *

"The foregoing discussion suggests that although women who are pregnant occupy a special position in society and in certain situations fulfil unique expectations, this *normal* state cannot be considered an illness, . . ."

J. McKinlay, The Sick Role—Illness and Pregnancy, 6 Social Sci. & Medicine 561, 568-569, 570.

The normality of pregnancy which distinguishes it from sickness or injury was recognized by Mr. Justice Powell concurring in this Court's recent decision in *Cleveland Board of Education v. LaFleur*, 42 U.S.L.W. 4186 (U.S. Jan. 21, 1974), in which he stated:

"[P]regnancy is a normal biological function possessing, in the great majority of cases, a fairly well defined term. * * *"

Cleveland Board of Education v. LaFleur, 42 U.S.L.W. 4186, 4192.

The basis of the majority opinion in *LaFleur* (the personal right to plan one's family) itself undercuts the contention that pregnancy is a disability like sickness or injury.

Newmon v. Delta Air Lines, Inc., Civil Action No. 15681 (N.D.Ga. Dec. 31, 1973), was a class action brought pursuant to Title VII of the Civil Rights Act

of 1964, 42 U.S.C. §§ 2000e, *et seq.*[22] The plaintiff alleged sex discrimination in the effectuation and operation of defendant's maternity leave policy. Plaintiff had been required to begin unpaid maternity leave at the end of her fifth month of pregnancy, and, while on such leave, she was not entitled to disability pay, accrual of seniority, group medical insurance benefits, or sick leave. The court first held that the mandatory maternity leave was a form of proscribed sex discrimination.

The court then addressed the question whether defendant violated the Civil Rights Act by denying its pregnant employees disability pay and other employment benefits while on maternity leave. Holding that such denial of benefits was not discriminatory on the

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[22]In *Wetzel v. Liberty Mutual Insurance Co.*, Civil Action No. 72-169 (W.D.Pa. Jan. 9, 1974), the court held the defendant's income protection plan violative of Title VII. The plan provided for continuation of income during "long term illness", and it excluded benefits for disabilities due to occupational injury, sickness covered by workmen's compensation insurance or pregnancy. The court held that Title VII standards were more strict than those of the Equal Protection Clause "in view of the express statutory mandate upon employers and the absence of the question of a 'rationale basis' for classification by which a state statute is measured." The court recognized pregnancy as a natural, foreseeable and "ultimately necessary" condition and noted that it was the only disability not within the other exceptions which was not covered by the income protection plan. Finally, the court noted that conditions limited to men, such as prostate troubles, were not excluded from coverage.

The court in *Wetzel* failed to recognize the crucial distinction between maternity and sickness. California's disability insurance program covers legitimate sickness and injury regardless of sex. It covers conditions such as prostate problems which are limited to men as well as those such as ectopic pregnancies which are suffered only by women. Because it covers only disabilities arising from sickness and injury, however, it excludes maternity which is neither sickness nor injury.

basis of sex, the court recognized the difference between pregnancy and illness or injury:

> "In the trial, both parties offered the testimony of highly qualified physicians—obstreticians [sic], gynecologists, hematoligists [sic] and psychiatrists in support of their respective positions. * * *
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> * * * *
>
> "Whether the plaintiff and her class are the victims of discrimination because of sex depends on the definition of pregnancy. After careful consideration of the evidence, including the medical testimony, it must be concluded that pregnancy is neither a sickness nor a disability. In the first place, pregnancy is, in most cases, a voluntarily imposed condition and the fact of its existence demonstrates that a woman is quite healthy and normal, since sick is defined as 'affected with disease; not well or healthy, ill, ailing, indisposed.' Webster's Third International Dictionary, Unabridged (1969) at p. 2110. A reasonable approach dictates the holding that pregnancy is not sickness in the usual sense of the word."
>
> *Newmon v. Delta Air Lines, Inc.*, Civil Action No. 15681, at pp. 11, 13-A to 14.

As the Court noted in *Newmon*, pregnancy is further distinguished from disease by the element of voluntariness. Judge Haynsworth observed in *Cohen v. Chesterfield County School Board*, 474 F.2d 395, 398 (4th Cir. 1973), *rev'd on other grounds, Cleveland Board of Education v. LaFleur*:[23]

> "Even pregnancy is not like illnesses and other disabilities. In this age of wide use of effective

[23] 42 U.S.L.W. 4186 (U.S. Jan. 21, 1974). See p. 22, *supra*.

contraceptives, pregnancy is usually voluntary. No one wishes to come down with mononucleosis or to break a leg, but a majority of young women do wish to become pregnant, though they seek to select the time for doing so. * * *

"Unlike most illnesses and other disabilities, too, pregnancy permits one to foresee its culmination in a period of confinement and to prepare for it. * * *"

Cohen v. Chesterfield County School Board, 474 F.2d 395, 398.

Since pregnancy is neither a sickness nor an injury, pregnant employees and those who have contracted a sickness or suffered an injury are not similarly situated. As this Court reiterated in *Reed v. Reed*,[24] the Equal Protection Clause of the Fourteenth Amendment does not deny the states "the power to treat different classes of persons in different ways." It merely denies the states the power "to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute."

Pregnant women are placed into a classification unlike that of the sick and injured by medical and biological fact. Sections 2626 and 2626.2 of the California Unemployment Insurance Code recognize the distinction between maternity and sickness or injury and differentiate only between persons who are not similarly situated. Therefore, the denial of maternity benefits under the disability insurance program is based upon a reasonable, nonarbitrary distinction between maternity and sickness or injury.

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[24]See pp. 16-18, *supra*.

The concluding section of this brief demonstrates that the classification made by Sections 2626 and 2626.2 satisfies the *Reed* test because it is reasonable, nonarbitrary, serves a legitimate governmental interest and "rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation." It further demonstrates that the exclusion of maternity benefits from California's disability insurance program does not deny due process of law. That exclusion satisfies the *LaFleur* test because it does not needlessly, arbitrarily, or capriciously impinge upon constitutional liberties.

IV.

The Exclusion of Maternity Benefits From Disability Insurance Coverage Is Rationally Based, Free From Invidious Discrimination, and Serves a Legitimate Governmental Purpose.

As set forth in California Unemployment Insurance Code Section 2601, the disability provisions of the Code are intended to provide partial compensation for wages lost due to injury or illness. Therefore, this legislation falls within what this Court has characterized as the area of economics and social welfare.

In *Dandridge v. Williams*, 397 U.S. 471 (1970), this Court made clear that states are free in the area of economics and social welfare to make classifications so long as they are rationally based and free from invidious discrimination. In *Dandridge* plaintiffs attacked the method used by Maryland in administering an aspect of its public welfare program. Maryland imposed an upper limit on the amount of money any family could receive under the Aid to Families With Dependent Children program. Plaintiffs claimed that this poli-

cy discriminated against large families whose needs exceeded the upper limit of the welfare program and that such discrimination violated the Equal Protection Clause of the Fourteenth Amendment. This Court upheld Maryland's allocation program stating:

> "[H]ere we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families. For this Court to approve the invalidation of state economic or social regulation as 'overreaching' would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' Williamson v Lee Optical Co., 348 US 483, 488, 99 L Ed 563, 572, 75 S Ct 461. That era long ago passed into history. Ferguson v Skrupa, 372 US 726, 10 L Ed 2d 93, 83 S Ct 1028, 95 ALR2d 1347.
>
> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v National Carbonic Gas Co., 220 US 61, 78, 55 L Ed 369, 377, 31 S Ct 337. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may

be, and unscientific.' Metropolis Theatre Co. v City of Chicago, 228 US 61, 69-70, 57 L Ed 730, 734, 33 S Ct 441. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' McGowan v Maryland, 366 US 420, 426, 6 L Ed 2d 393, 399, 81 S Ct 1101.

"[W]e can find no basis for applying a different constitutional standard. * * * And it is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.

* * * *

"[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. Lindsley v Natural Carbonic Gas Co., 220 US 61, 55 L Ed 369, 31 S Ct 337. It is enough that the State's action be rationally based and free from invidious discrimination. The regulation before us meets that test.

"[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. * * *"

Dandridge v. Williams, 397 U.S. 471, 484-487.

Similarly, in *Jefferson v. Hackney*, 406 U.S. 535 (1972), plaintiffs attacked the formula whereby Texas allocated its available welfare funds among classes of recipients. Under the Texas system the elderly received 100 percent of the full standard of need, the blind and

disabled received 95 percent, and those receiving benefits under the Aid to Families With Dependent Children program received only 75 percent of the standard of need. Plaintiffs claimed that this system denied them the equal protection of the laws because a larger percentage of Blacks and Mexican-Americans participated in the Aid to Families With Dependent Children program than in the other programs.

Rejecting plaintiffs' argument and holding that Texas' allocation system was constitutionally valid, this Court held:

> "This Court emphasized only recently, in Dandridge v Williams, 397 US 471, 485, 25 L Ed 2d 491, 501, 90 S Ct 1153 (1970), that in 'the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.' A legislature may address a problem 'one step at a time,' or even 'select one phase of one field and apply a remedy there, neglecting the others.' Williamson v Lee Optical Co. 348 US 483, 489, 99 L Ed 563, 573, 75 S Ct 461 (1955). So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them.
>
> * * * *
>
> "The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational

the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment.

"Applying the traditional standard of review under that amendment, we cannot say that Texas' decision to provide somewhat lower welfare benefits for AFDC recipients is invidious or irrational. Since budgetary constraints do not allow the payment of the full standard of need for all welfare recipients, the State may have concluded that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living. While different policy judgments are of course possible, it is not irrational for the State to believe that the young are more adaptable than the sick and elderly, especially because the latter have less hope of improving their situation in the years remaining to them. Whether or not one agrees with this state determination, there is nothing in the Constitution that forbids it.

* * * *

"In conclusion, we re-emphasize what the Court said in Dandridge v. Williams, 397 US, at 487, 25 L Ed 2d at 503:

" 'We do not decide today that the [state law] is wise, that it best fulfills the relevant social and economic objectives that [the State] might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly

including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. * * *' "

Jefferson v. Hackney, 406 U.S. 535, 546-551.

In *New York State Department of Social Services v. Dublino*, ... U.S. ...., 93 S.Ct. 2507 (1973), this Court reversed a lower court decision invalidating the Work Rules of New York's Social Welfare Law stating:

"It could impair the capacity of the state government to deal effectively with the critical problem of mounting welfare costs and the increasing financial dependency of many of its citizens. * * * To the extent that the Work Rules embody New York's attempt to promote self-reliance and civic responsibility, to assure that limited state welfare funds be spent on behalf of those genuinely incapacitated and most in need, and to cope with the fiscal hardships enveloping many state and local governments, this Court should not lightly interfere. The problems confronting our society in these areas are severe, and state governments, in cooperation with the Federal Government, must be allowed considerable latitude in attempting their resolution."

New York State Department of Social Services v. Dublino, 93 S.Ct. 2507, 2513 (1973).

See also *United States v. Kras*, 409 U.S. 434 (1973); *Richardson v. Belcher*, 404 U.S. 78 (1971).

The disability insurance provisions of the California Unemployment Insurance Code meet the standards for economic and social welfare legislation set forth in *Dan-*

dridge, Jefferson and *Dublino*. Those cases hold that the California State Legislature may address the problems of unemployment "one step at a time" and "select one phase of one field and apply a remedy there, neglecting the others." The Legislature has chosen to alleviate the burdens of unemployment caused by sickness and injury through its program of disability insurance. In order to provide adequate benefits to the sick and injured, the Legislature has determined that maternity benefits must be excluded from coverage. As Judge Williams noted in his dissent from the District Court's opinion, it would cost more than $120,000,000 and require a 30 percent increase in revenues to provide maternity benefits to the estimated 210,000 eligible recipients in California. *Aiello v. Hanson*, 359 F.Supp. 792, 802 n.2 (N.D.Cal. 1973).

In the area of disability benefits, as with other social welfare programs, economic considerations are, of necessity, a major subject of concern and a legitimate governmental interest. In 1946, Governor Earl Warren proposed to the legislature the creation of the disability insurance program. His message demonstrated that the cost of the program had received careful scrutiny:

> "[W]e have had eight years of experience, and this experience demonstrates that disability compensation can be made available to workers without affecting the solvency of the fund and without the necessity for an additional contribution from anyone.
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> "The basic idea on which the Unemployment Insurance Program was based, was that the cost of involuntary unemployment should be borne by the economic system as a whole.

"The purposes of the program were two-fold: First, to reduce to a minimum involuntary unemployment, the suffering caused thereby, and the resulting decline of purchasing power, and second, to avoid the necessity for resorting to costly relief programs.

* * * *

"Employee contributions, when they are required, must be borne entirely by the individual worker, because, unlike the case of the employer there is no one to whom the worker can pass the burden. His contribution is really in the nature of a gross income tax, as distinguished from what is merely an excise tax as far as the employer is concerned.

"Therefore, it is primarily on the ground of financial necessity that the employee's contribution toward the financing of the unemployment insurance can be justified.

* * * *

"Unemployment resulting from illness or disability is a risk faced by all workers. Sickness or injury of a worker, when nonoccupational in character and therefore not compensable under the Workman's Compensation Act, deprives the worker and his family of their primary source of income, the pay check, at a time when income is most needed.

"When sickness strikes down the breadwinner, living expenses continue just the same, and, in addition, there is often extra expense occasioned by the illness itself.

* * * *

"It is not possible for employees to obtain from private insurance companies protection against loss of wages or salary during sickness as adequately or cheaply as that protection could be obtained by diverting their present 1 per cent contribution for the support of a Disability Benefits Program.

* * * *

"Based on Rhode Island's actual experience, and with allowance for differences between the Rhode Island Law and the program now under consideration for California, the cost in California would approximate $35,000,000 a year.

"This cost could be met entirely out of the 1 per cent employee contribution. * * *"[28]

The California courts have recognized the economic necessity of the exclusion of maternity benefits contained in Section 2626 of the Unemployment Insurance Code. Recognizing the State's legitimate interest in maintaining the solvency of its programs, they have

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[28]California Senate Journal, June 23, 1946, at pp. 228-229. Governor Warren's reference to Rhode Island's experience demonstrates that those who planned the California Disability Insurance Program were well aware of the heavy financial burden which maternity benefits place on such a program. Originally, maternity benefits were covered in the Rhode Island plan. During the first benefit year, 4,310 women received over $652,000 in benefits under the program. Rhode Island's program began in 1944, and by mid-1946 it had incurred a deficit of nearly one and one-half million dollars. Payments in pregnancy cases amounted to more than double the payments in workmen's compensation cases from Rhode Island's disability fund. In 1946, the Rhode Island program was amended with respect to pregnancy cases. This amendment provided that, except for "unusual complications arising as a result of childbirth," no person could receive benefits for more than 15 weeks for unemployment due to pregnancy. N. Sinai, Disability Compensation for the Disabled Sick 29-31 (1949).

upheld that section as creating a classification reasonably designed to achieve the objectives of the legislation. In *Clark v. California Employment Stabilization Commission*, 166 Cal.App.2d 326, 332 P.2d 716 (1958), the court discussed the legislature's reasons for excluding maternity benefits from disability coverage:

> "The exclusionary provisions in question are part of a legislative program conferring unemployment compensation disability benefits upon a defined group of employees. Persons sustaining disability caused by pregnancy, by the terms of the statute, are not within this group. * * * Whether such disability benefits should be extended to pregnant women is a matter solely for legislative determination, and is not within the scope of judicial decision.
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> "Without doubt, the rate of employee contributions is related directly to the demand made upon the Fund, which, in turn, is affected by the extent of the coverage provided. It is a matter of common knowledge that illness or injury arising from pregnancy is classified and excluded from the coverage provided by private contracts of health and accident insurance, in order to effect a premium rate lower than is required in the absence of such an exclusion. It is reasonable to assume that the inclusion of illness or injury caused by pregnancy within the coverage provided by the statute would increase substantially the demands upon the Fund and require a like increase in the contribution rate. As these conclusions are

within reason, the inquiry into conditions establishing them is a matter for the Legislature, as is also the determination respecting the relative merits of inclusion or exclusion in comparison with the incident contribution rate. It was properly within the sphere of legislative action to determine whether the objects of the statute in question would be served best by including a disability benefit which reasonably might impose upon the majority of employees a burden disproportionate to contemplated benefits, in order to favor the minority who are included within the classified group. These reasons indicate that the class excluded was not arbitrarily selected, and that the purpose of the exclusion was germane to the legislative object.

"Moreover, to award disability compensation to women employees on account of illness caused by pregnancy, in effect, constituted a maternity benefit plan for a limited group, i.e., women employees. The purpose of the unemployment disability program is to afford relief to employees sustaining loss of wages on account of illness, and not to confer maternity benefits. * * *"

Clark v. California Employment Stabilization Commission, 166 Cal.App.2d 326, 329-332, 332 P.2d 716, 719.

Accord, Rentzer v. California Unemployment Insurance Appeals Board, 32 Cal.App.3d 604, 108 Cal.Rptr. 336 (1973).

California's disability insurance program is only one part of the State's comprehensive social welfare plan.

Workmen's compensation insurance,[26] unemployment insurance,[27] aid to the elderly,[28] aid to the blind,[29] and aid to families with dependent children[30] are some of the other means whereby California seeks to alleviate certain misfortunes which may befall its residents. Each such program is designed and intended to assist only persons suffering certain narrowly defined hardships. California's disability insurance program is intended solely to compensate in part for disability arising from sickness or injury. Neither California nor any other state has the financial resources to alleviate each and every type of hardship experienced by its residents. Accordingly, California has not undertaken to provide maternity benefits under any of its social welfare programs. This decision is based on a rational, nonarbitrary distinction between pregnancy and other conditions which may befall California residents.

The exclusion of maternity benefits from California's disability insurance program is one manner in which the California Legislature has attempted to meet its

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[26]California Labor Code §§ 3201 *et seq.* (West, 1971).

[27]California Unemployment Insurance Code §§ 100 *et seq.* (West, 1972).

[28]California Welfare and Institutions Code §§ 12000 *et seq.* (West, 1972).

[29]California Welfare and Institutions Code §§ 12500 *et seq.* (West, 1972).

[30]California Welfare and Institutions Code §§ 11200 *et seq.* (West, 1972).

Under the Aid to Families With Dependent Children Program, needy pregnant women, including those with no other children, may receive support without regard to their marital status. California Department of Social Welfare Manual of Policies and Procedures, 44-213.3.

responsibility of "allocating limited public welfare funds among the myriad of potential recipients." It has taken "one step at a time"; it has selected "one phase of one field and applied a remedy there." This decision of the Legislature is rationally based and does not involve invidious discrimination. It therefore meets the standards set forth in *Dandridge*, *Jefferson* and *Dublino* for legislation within the area of economics and social welfare.

The classification contained in Sections 2626 and 2626.2 of the Code is reasonable, nonarbitrary, and bears a substantial relation to the legitimate governmental purpose of maintaining the fiscal integrity of the disability insurance program. Therefore, the classification satisfies the *Reed* test and does not deny the equal protection of the laws. Similarly, while advancing legitimate state interests, the exclusion of maternity benefits satisfies the *LaFleur* standard because it does not needlessly, arbitrarily or capriciously impinge on constitutionally protected liberties. Nor does it create any irrebuttable presumptions which unduly penalize women who decide to bear children. Sections 2626 and 2626.2 of the Code merely express California's decision not to pay maternity benefits under an insurance program designed to assist the sick and injured. Therefore, those sections do not deny due process of law. Accordingly, the exclusion of maternity benefits contained in Sections 2626 and 2626.2 of the California Unemployment Insurance Code is a valid classification and is not violative of the Constitution of the United States.

Conclusion.

The cases of Appellees Aiello, Armendariz and J[illegible] son have become moot and should be dismissed [illegible] vacated and remanded for consideration of the m[illegible] ness issue.

The District Court reached its decision in the c[illegible] of Appellee Jaramillo without realizing that nor[illegible] pregnancy is not a sickness or injury. Failing to rec[illegible] nize the crucial distinction between normal pregn[illegible] and the disabilities which California's disability i[illegible] ance program was designed to alleviate, the Di[illegible] Court erroneously ruled that maternity benefits mu[illegible] paid under that program. The Associations and [illegible] Employers therefore urge that the District Court's [illegible] cision in Appellee Jaramillo's case be reversed.

Dated: February 8, 1974.

Respectfully submitted,

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